PERLIS PLANTATIONS BHD.

v.

MOHAMMAD ABDULLAH ANG & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C3992 OF 1984]
29 AUGUST 1986

CONTRACT: *Loan agreement - Debt - Sections 10, 14, 15, 19 of Contracts Act - Option agreement - Acknowledgment of loan - Moneylenders Ordinance.*

CIVIL PROCEDURE: *Order14 - Triable issues - Defences on merits - Counterclaim.*

In this case the plaintiff's director, one Dato Khoo Kay Peng and the defendant had agreed to purchase land belonging to Kauri in three equal shares. Following a meeting between the parties, a firm of solicitors were given the instructions to act for them. Subsequently, on 30 May 1983, a written sale and purchase agreement was entered into between a company called Kaikoura Sdn. Bhd. as purchasers and Kauri as vendors. Kaikoura was under the control of the plaintiffs. Payment was made towards the purchase price. A further payment was due on 14 June 1983 in respect of which Beau Kuok (another director of the plaintiffs) had earlier given the defendant's cheque together with the plaintiff's guarantee that the cheque would be honoured. On that day it was suggested to the defendant that the position should be studied before making payment.

Held:

[1] The defendant had admitted that it was on the promise to repay RM4,222,042.62 with interest that the plaintiff's had paid the vendor's solicitors RM3,888,709.29, the no consideration defence does not provide the defendant with any arguable defence.

[2] The defendant had also admitted that the money was lent in the course of and for the purpose of the plaintiff's business of property development and accordingly the specific exclusion under the provision defining a money lender in the Moneylenders Ordinance puts paid to the moneylender defence.

[3] In his defence of duress the defendant had also failed to prove that his consent to the agreement was caused by coercion as defined under s. 15 of the Contracts Act.

[4] Judgment should be given for the Plaintiff's in the sum of RM2.8 million together with interest thereon at 12.5% per annum from 1 June 1984 to the date hereof. The costs of the O. 14 application and of this appeal will also be paid by the defendant. The judgment debt will carry interest at 8% per annum from the date of judgment until realisation.

Legislation referred to:
Contracts Act 1950, ss. 10, 14, 15, 19
Evidence Act 1950, s. 73A(6)

For the plaintiffs/appellants - Wong Chong Wah; M/s. Skrine & Co.
For the defendant/respondent - Shakuntala Devi Sharma; M/s. Sharma & Jaafar

JUDGMENT

VC George J:

This is the plaintiffs' appeal from the order of the Senior Assistant Registrar of 9 May 1985 dismissing the plaintiffs' application for summary judgment under O. 14 and giving the defendant unconditional leave to defend.

The plaintiffs by their statement of claim contended that they had for and at the request of the defendant made certain payments, RM333,333.33 to one Kauri Sdn. Bhd. (hereinafter referred to as Kauri) and RM3,888,709.29 to Kauri's solicitors M/s Mah-Kok & Din and in consideration of their having done so the defendant had agreed to repay the amount (totalling RM4,222,042.62) together with interest thereon at the rate of the plaintiffs' costs of funds (which it was contended was at the relevant stage 12.5% p.a.) on or before 15 August 1983. It was further contended that the defendant had made certain part repayments and as to the balance (and further interest to be accrued), at the request of the defendant, the plaintiffs had agreed to allow the defendant to pay off the amount in certain agreed monthly instalments. After three of these instalments had been paid the defendant had ceased making further payments leaving a balance of RM2,800,000 together with interest thereon at 12.5% p.a. calculated from 1 June 1984 until realisation which unpaid amount is the subject of the action.

In their O. 14 application, the plaintiffs primarily relied on a number of documents as evidence supporting their contentions, which documents were exhibited to the supporting affidavit. The first of these is dated 14 June 1983 and is a written acknowledgment by the defendant of the said advancement of RM4,222,042.62 by the plaintiffs on behalf of the defendant and at his request. It also contains his undertaking to repay the amount (together with interest at the rate of the plaintiffs' cost of funds) on or before 15 August 1983. The second document is an option also dated 14 June 1983 stated to be valid for 3 months (apparently executed simultaneously with the aforesaid written acknowledgment and undertaking) given by the defendant to the plaintiffs (in consideration of the said advancement) for the plaintiffs to participate with the defendant in the development of certain lands in Kuala Lumpur. The plaintiffs also rely on various letters of demand sent to the defendant and replies thereto sent by him (or on his behalf) culminating in the defendant's letter of 7 March 1984 offering "to settle the loan given to me by Perlis Plantations Bhd. by 10 (ten) monthly repayments of RM400,000 beginning March 1984" which was followed by a written acceptance by the plaintiffs of the offer and with the defendant pursuant thereto delivering 10 post-dated cheques to the plaintiffs to be used for the aforesaid payments. The first 3 of these cheques were honoured on presentation, the last 7 dishonoured. On the face of these documents the plaintiffs certainly appear to have an open and shut case.

For the defendant it has been contended that there are triable issues, that he has a defence on merits and that he in fact has a counterclaim against the plaintiffs. It is contended that the written acknowledgment (and undertaking) as well as the option are void and of no effect and/or unenforceable because the defendant had been prevailed into executing each of those documents as a result of duress. The defendant also invokes the Moneylenders Ordinance. His third line of defence is that the promise to repay the money is unenforceable in that there was no consideration for the promise.

The defendant by his affidavit encl. (18) explains how he came to execute those two documents. He says, *inter alia*, that he is a successful businessman with his businesses in each of the years 1982 and 1983 having had a turnover in the region of RM40 million, that

the plaintiff company which is a public listed plantation based company which has diversified into *inter alia* property development, is not a registered moneylender under the Moneylenders Ordinance 1951 and that one Robert Kuok and his son Beau Kuok are directors of the plaintiff company. He has not been challenged on these contentions.

He then went on to state that he came to know of the availability of the land belonging to Kauri and had impressed Robert Kuok and one Dato Khoo Kay Peng about its potential for development as a result of which "a loose intention to purchase the property in three equal shares was formed" and that the defendant was to investigate the matter further.

According to the defendant, on 5 May 1983 a meeting was held at the house of Robert Kuok. At that meeting agreement was arrived at between the plaintiffs who were represented by Robert Kuok and Beau Kuok on the one part, Malaysian United Industries Bhd. (MUI) (represented by Dato' Khoo Kay Peng) of the second part and the defendant of the third part, for the plaintiff, MUI and the defendant to purchase the said land at RM50 per square foot (which would bring the total purchase price to some RM50 million). It was further contended that as the defendant had to go abroad Beau Kuok was commissioned "to finalise the purchase negotiations" pursuant to which on the following day the defendant says that he accompanied Beau Kuok to the office of M/s. Nazri Aziz & Wong, Advocates & Solicitors of Kuala Lumpur who were given instructions to act for the intending purchasers of the property. A memorandum under the hand of Beau Kuok of what transpired at the office of the solicitors is exhibited by the defendant to his affidavit as MAA2 pp. 6 & 7. The memorandum shows that the instructions given to the solicitors were for them to act for the intending purchasers who were stated to be the plaintiff, MUI and the defendant (in equal shares) and sets out the terms on which the purchasers were prepared to buy the property. On the face of the memorandum is the statement that it was meant for circulation viz:

> Dato' Khoo Kay Peng/Encik Yong Ming Lau - MUI. Encik Mohamed Abdullah Ang - MAA (i.e. the defendant) Encik Robert Kuok/Encik Beau Kuok - PPB. (i.e. the plaintiffs).

The defendant went on to state in his affidavit that before he went abroad (on 10 May 1983), he had with the consent of Robert Kuok and Dato Khoo Kay Peng given to the vendors a letter of intent supported by his own cheque for RM1 million "as an earnest of the intention of (himself), the plaintiffs and MUI to buy Kauri and/or the property". He had also left behind a cheque for RM3,888,709.29 to be used for further payments towards the purchase price if the deal went through. Towards the end of May when the defendant realised that Dato Khoo Kay Peng was having second thoughts about proceeding with the purchase, he says that he had suggested to Robert Kuok that perhaps the project ought to be abandoned but according to him Robert Kuok had prevailed on him for the project to be proceeded with the plaintiffs and defendant as equal partners in the joint venture.

On 30 May 1983 a written sale and purchase agreement was entered into between a company called Kaikoura Sdn. Bhd. as purchasers and Kauri as vendors of the shares of the company that owned the property. One Tan Yew Jin executed the agreement on behalf of Kaikoura which according to the defendant was a dormant shell company "under the control of Beau Kuok and/or Perlis (i.e., the plaintiffs)". Apparently there were a number of deviations from what was set out in the said memorandum (of what had transpired at the solicitors' office) in the terms and conditions as set out in the agreement. The defendant says that from the point of view of the purchasers it was an extremely unsatisfactory agreement and he says that it came about through the negligence of and breach of duty by Beau Kuok. Towards payment of the purchase price the vendors were paid RM666,667.67 provided by the defendant

and RM333,333.33 provided by the plaintiffs (the defendant's cheque for RM1 million was apparently returned by the vendors). A further payment of RM3,888,709.29 was due on 14 June 1983 in respect of which apparently Beau Kuok had earlier given to the vendors the defendant's cheque together with the plaintiffs' guarantee that the cheque would be honoured.

On that due day, 14 June 1983, the defendant went to the office of the plaintiffs where he apparently met Beau Kuok and the Chairman of the plaintiff company one Geh Ik Cheong and says that for the first time he saw a copy of the unsatisfactory sale and purchase agreement. Apparently (according to the defendant) Geh Ik Cheong shared the defendant's view that the terms of the agreement were unsatisfactory. Apparently the plaintiffs were not prepared to proceed with the completion of the project. Geh suggested that some time to study the position would be gained by not making the said payment on due date.

It is on what transpired thereafter that the defendant relies on for his complaint of duress, and I quote extensively from pp. 17 and 18 of his affidavit where he deals with the point. The defendant says that:

> I cautioned against this because of the damage to my reputation as it was a MAA (i.e. the defendant's) cheque and the damage to Beau Kuok's reputation as he had guaranteed the cheque and to Perlis reputation as they were known Purchasers.

He went on to state -

> I was alarmed that the owners should be given cause to speak of a returned MAA cheque particularly as I was also engaged in negotiations with them on behalf of MOIC in respect of another transaction. Geh Ik Cheong suggested that Perlis's share for the payment be treated as a loan to me so as to give Perlis more time to study the project in greater depth. He did not say that Perlis was withdrawing from the project. He stressed that Perlis being a public listed company it was necessary for him to regularise matters. Under pressure, I agreed. And the option agreement and acknowledgment that appear in pp. 37 and 39 and p. 40 respectively of Exhibit MAA2 was produced to me for my execution - and Perlis's bankdraft for RM3,888.709.29 was released to Kauri's solicitors at about 4 p.m.

The defendant went on to state -

> However I would never have so agreed or executed the said documents had not Perlis placed me in quite an impossible position by resiling from their agreement to contribute half the purchase price and also by committing me to the extremely unsatisfactory terms of the first agreement.

The defendant then went on to deal with his next line of defence, his invocation of the Moneylenders Ordinance. His contention is that even if the agreement to repay the monies paid to vendors is binding on him it is either void or in any event unenforceable because the plaintiffs have been demanding interest on the amount paid out by them when they were not licensed money-lenders. He says that the plaintiffs had earlier lent one of his companies money repayable with interest and that he hoped to obtain information before the trial of other such moneylending transactions carried out by the plaintiffs.

The defendant then devotes one paragraph in his affidavit to the defence of lack of consideration. His argument is that there was no consideration for the promise to repay the money since the plaintiffs had been obliged to pay half the amount said to have been paid by the plaintiffs to the vendors on behalf of the defendant. He also contends that in any event the money advanced by the plaintiff was, if repayable, repayable by Kaikoura and not by him.

The defendant says that with the plaintiffs pulling out of the deal he was stuck with the sale and purchase agreement. He had suffered difficulties in completing the sale without the support of the plaintiffs and had to persuade the vendors from time to time to agree to various variations in respect of completion, each concession thereby made by the vendors being at the expense of the purchasers, resulting in the defendant suffering in damages in respect of which the defendant submits that he has a counterclaim against the plaintiffs as well as claims against Beau Kuok and Robert Kuok.

I now deal with each of the lines of defence taken by the defendant.

No consideration:

It is by para. 18 of the statement of defence that the no consideration defence is taken:

> the said agreement referred to in para. 14 and/or the said acknowledgment referred to in para. 15(i) hereof are unenforceable by reason of the fact that there was no consideration for Mr. Ang's (The defendant refers to himself as Mr. Ang) promise to repay the sum of RM4,222,042.62 as aforesaid.

However, by paras. 13 and 14 of the statement of defence the defendant states that at a meeting held on 14 June 1983 he was informed by the plaintiffs that they were withdrawing from the project and that it was thereupon "orally agreed that in consideration" of the plaintiffs paying the vendors' solicitors the second payment due in respect of the purchase of the land (i.e. RM3,888,709.29) the defendant would "personally repay (the plaintiffs) the sum of RM4,222,042.62 with interest thereon ..."

In my judgment, that there was no need for the defendant to have entered into such an agreement with the plaintiffs because the plaintiffs were obliged to pay half the purchase price, and that because the purchaser of the land was Kaikoura and not the defendant, do not by any means amount to the promise to repay having been made without consideration. In the face of what is admitted by the defendant himself in para. 14 of the statement of defence that it was on the promise to repay RM4,222,042.62 with interest that the plaintiffs had paid the vendors' solicitors RM3,888,709.29, the no consideration defence does not provide the defendant with even an arguable defence.

Moneylending

In defining a moneylender the Moneylenders Ordinance 1951 specifically excludes from that term "any person *bona fide* carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money."

The defendant states in para. 5 of his affidavit that the plaintiff

> is a plantation based public listed company which diversified into the business of property development and hotelliers. In line with its diversification programme, Perlis has entered into joint-venture agreements with United Estates Properties, a public listed property development company Shaw Brothers (M) Sdn. Bhd. and Rasa Sayang Beach Hotels (Penang) Bhd.

The defendant's version of how the plaintiffs came to lend the money, as has been seen as stated in his affidavit, is that the defendant and the plaintiffs were to buy the property in equal shares and develop it as a jointventure project. When the second payment was due to be paid the plaintiffs had second thoughts about going on with the venture. The defendants states in para. 17 of his affidavit that the Chairman of the plaintiff company Geh Ik Cheong

> suggested that Perlis's (i.e. the plaintiffs') share for the payment (i.e. the second payment) be treated as a loan to me so as to give Perlis more time to study the project in greater depth ... Under pressure, I agreed ... and Perlis's bankdraft of RM3,888,709.29 was released ... "

In my judgment these statements by the defendant (i.e. paras. 5 and 17 of his affidavit) puts paid to the money-lending defence. They amount to his conceding that the plaintiffs *bona fide* carry on the business of property development pursuant to which they agreed to go along with the defendant on a joint venture to buy and develop the property but having second thoughts lent money to the defendant so that he could proceed with the project on his own with provision for the plaintiffs to have time to study the project in depth to decide whether they would after all get involved in it. It is to be noted that in consideration for the loan one of the things the defendant had to do and did was to give the plaintiffs an option to take up shares in the project (which point is also relevant *vis-a-vis* the "no consideration" defence). Going by what the defendant himself says clearly the money was lent in the course of and for the purposes of the plaintiffs' business of property development and accordingly the transaction falls squarely within the ambit of the aforesaid specific exclusion and puts paid to the moneylending defence.

Duress

This defence is taken by para. 16 of the statement of defence which reads as follows:

> The said agreement referred to in para. 14 and/or the purported acknowledgment referred to in para. 15(i) hereof are void and of no effect and/or are unenforceable by Perlis by reason of the duress of the part of Perlis.

As has been seen the defence is based on what was said to have transpired on 14 June 1983 at the office of the plaintiffs. The defendant's statement on this is para. 17 of the affidavit encl. (18). It is useful to highlight the points made in that paragraph:

(i) The defendant was astonished to be told that the terms of the sale and purchase agreement were to the disadvantage of the buyers - that instead of making some RM200 million the purchaser would take a loss of some RM16 million and that there would be a tax disadvantage of RM42 million.

(ii) Geh Ik Cheong, the Chairman of the plaintiff company suggested that the second payment in respect of the purchase price that was due to be paid on the 14 June 1983 be not paid on that day to gain some time to study the project.

(iii) The defendant "cautioned" against this because of -

(a) damage to his reputation

(b) damage to Beau Kuok's reputation

(c) damage to Perlis's reputation.

(iv) The defendant was alarmed at his cheque being dishonoured particularly as he was engaged in negotiations with the vendors in respect of another transaction.

(v) Geh suggested that Perlis be given time to study the project in greater depth.

(vi) The defendant emphasises that Geh did not say that Perlis was withdrawing from the project. He said that Geh stressed that Perlis being a public listed company it was necessary for him to "regularise matters."

(vii) The defendant then states "under pressure I agreed". Going by what is stated in para. 17 of the affidavit, what the defendant agreed to was for Perlis (that is the plaintiffs) to get out of its commitment to join the defendant in the purchase of the property and for the plaintiffs' share of the payment to the vendors to be treated as a loan to the defendant. He

also agreed that the plaintiffs could after an in-depth study of the project opt to re-join and participate in the project, if they so desired.

(viii) Accordingly, he signed the option agreement and acknowledgment and the plaintiffs effected payment of the amount due to the vendors.

Section 10 of the Contracts Act (Act 136) states that:

> all agreements are contracts if they are made by the free consent of the parties ...

Section 14 provides that

> consent is said to be free when it is not caused by:
>
> (a) coercion as defined in s. 15;
>
> (b) undue influence ...
>
> (c) fraud ...
>
> (d) misrepresentation ...
>
> (e) mistake ...

Section 15 defines coercion to be

> the committing or threatening to commit any act forbidden by the Penal Code, or the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Section 19 provides that

> when consent to an agreement is caused by coercion, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

I pause to observe that coercion does not make the contract void as was contended by and for the defendant. Neither for that matter, (even if it is relevant) does the lack of a money-lender's licence. In the former case the contract is voidable (and not void) at the instance of the party whose consent to the agreement was obtained by coercion. In the latter case the contract is unenforceable (and not void).

For duress to amount to a defence the defendant should be able to show that his consent to the agreement he had entered into was not free in that such consent was caused by coercion as defined by s. 15 of the Act. This the defendant does not even attempt to do. He does not make any accusation of the committing or threatening to commit any act forbidden by the Penal Code or of the detention or threat to detain property. Puan Sharma of Counsel for the defendant submitted that the defendant's consent to the contract was not free because it was obtained by what she referred to as "economic coercion". She says that the English Courts have allowed a contract which had been entered into by one party as a result of "economic coercion" to be avoided. That may be so but our Contracts Act does not provide for any form of coercion other than as defined by s. 15.

In any event, going by what the defendant says in para. 17 of his affidavit encl. (18), that the plaintiffs wanted to pull out of a project that would result in a tax disadvantage of RM42 million and the eventual loss of RM16 million (i.e. what the defendant seems to have accepted to be the position) cannot be said to be an application of some form of coercion on the defendant.

Now on 17 June 1983, i.e. 3 days after he had signed the acknowledgment of debt (and the undertaking to repay it) and the option, the defendant wrote a letter to Robert Kuok which he had exhibited as pp. 42 to 45 to the bundle of documents attached to his affidavit. This letter I accept as being a contemporaneous document within the meaning of that term as used in s. 73A(6) of the Evidence Act. It was a long letter by which the defendant is seen trying to persuade Robert Kuok that the plaintiffs should continue to participate in the project. In the letter the defendant sets out the circumstances and reasons for his assuming the payments made by the plaintiffs to the vendors of the property as a personal loan to him. At p. 2 of his letter he refers to his meeting with Geh Ik Cheong and Beau Kuok during the morning of 14 June 1983 when he

> was told that the Agreements were bad with no provisions for FIC's approval and the tax disadvantage of RM42 million was not considered and the project is not viable and that it would eventually incur a loss of RM16 million.

The defendant went on to write:

> Mr. Geh even went to the extent of suggesting twice that, worse comes to the worst, we do not meet the RM3,888,709.29 payment due that day and 'let them write to us so that we have few days to study.' I then immediately cautioned the meeting and warned them of the consequences of breaching the contract and the resultant damage it would cause to the reputation of the parties concerned. In my anxiety to protect our reputation and integrity and further, to bail Beau out of a delicate and possible, embarrassing situation; to safeguard the project I told the meeting that, in that case, I would rather take over the project. I said this because I am confident of convincing you and Datuk Khoo to honour the commitment given to me. Furthermore, I am confident of the viability of this project. I was not given the opportunity to speak to you when you were on the telephone with Mr. Geh. What I could not apprehend, Robert, was why were not all these matters brought up for discussion before? Why at this eleventh hour?
>
> In the course of one of the several adjournments, I called Beau aside for a private discussion. I informed Beau that I was prepared to accept full responsibility and assume the payment by Perlis Plantation Bhd. as a personal loan to me in order to give more time for Perlis Plantation Bhd. to study the project in greater depth, as suggested by Mr. Geh.

These lines show the state of mind of the defendant when he took over the project. I failed to see that coercion, economic or otherwise, had anything to do with his decision. The plaintiffs thought that the project was doomed to failure and wanted to cut their losses. The defendant thought the project could be saved and was prepared to proceed with it on his own.

Accordingly, the duress defence relied on by the defendant is misconceived and provides no defence known to our law to the defendant.

In my judgment, the defendant has not come forward with any *bona fide* defence or even an arguable point and accordingly it is the Court's duty to give judgment to the plaintiffs. The appeal is allowed. There will be judgment for the plaintiffs in the sum of RM2.8 million together with interest thereon at 12.5% per annum from 1 June 1984 to the date here of. The costs of the O. 14 application and of this appeal will also be paid by the defendant. The judgment debt will carry interest at 8% per annum from date of judgment until realisation.

Also found at [1988] 1 CLJ 670